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No. 80-1260

IN THE

Supreme Court of the United States

October Term, 1980

THOMAS S. LEONHARD, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

BRIEF OF RESPONDENTS CITY OF BUFFALO AND SAMUEL GIAMBRONE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Preliminary Statement

The Defendants City of Buffalo and Sergeant Samuel Giambrone feel the Statement of Facts of this particular action have been adequately set forth in the opinion of Circuit Judge Kearse of the United States Court of Appeals, Second Circuit, which is set forth in Pages A-11, etc. of Petitioners' Appendix. The facts as set forth by the Plaintiffs will suffice at this time and are adequate so that these Defendants can submit this Brief.

POINT I

The Court below correctly stated the law in this case.

The Rules of Civil Procedure provide in Rule 9-d that an averment that an official act was done in compliance with law is sufficient. However, it does not do away with the basic Hornbook rule of pleading that requires a plaintiff to plead facts and not conclusions or bare allegations as pointed out by the United States Court of Appeals, Second Circuit (Page A-38 of the Appendix).

The City of Buffalo's actions can only be those performed through the activities of Defendant Samuel Giambrone. Those actions are the allegations set forth by the Court of Appeals at Page A-51 of the Appendix and labeled them a mere allegation.

Further, the Court correctly pointed out at Pages A-50 and 51 that even these bare allegations do not claim that Defendant Giambrone acted pursuant to any "official policy, regulation or custom of the City" as required by the holding of *Monell v. Department of Social Services*, 436 U.S. 658.

POINT II

Plaintiffs are estopped from objecting to the dismissal against Giambrone.

The Plaintiffs herein are estopped from objecting to the dismissal of the claim against Defendant Giambrone. It was the Plaintiffs, through their counsel, who requested of District Judge Burke that the complaint against Giambrone be dismissed. They point out at Pages 10-11 of the Petition that Giambrone did not move for dismissal of the complaint. In fact it was after Plaintiffs learned that their appeal was subject to dismissal

on the ground that it was premature pursuant to Rule 54 of the Federal Rules of Civil Procedure that they, through their counsel, implored the Honorable District Court Judge, on Plaintiffs' motion, without a hearing or notice to the parties that he add Defendant Giambrone to the list of those defendants against whom dismissals were granted. To imply to this Court that the dismissal of the complaint against Giambrone was either a surprise or prejudicial to the Plaintiffs without setting forth before this Court the true facts leading to the dismissal is an attempt to mislead the Court.

POINT III

That based on the law and the facts as set forth there is no basis for this Court to grant a Writ of Certiorari as requested.

Respectfully submitted,

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